

1 THE HONORABLE THOMAS S. ZILLY

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7 UNITED STATES DISTRICT COURT
8 FOR THE WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 GERARD J. NG,

11 Plaintiff,

NO. C09-192Z

12 vs.

ORDER

13 JOHN E. POTTER, Postmaster General,

14 Defendant.
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17 THIS MATTER comes before the Court on Defendant's Motion to Dismiss
18 Plaintiff's Hostile Work Environment Claim, dkt. 10. Having considered the papers
19 filed in support of and in opposition to the motion, the declarations and exhibits
20 attached thereto, including the EEO Complaint of Discrimination, the USPS
21 Acceptance for Investigation letter, and the Final Agency Decision, and having heard
22 oral argument on November 3, 2009, the Court enters the following Order.
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1 **I. Background**

2 **A. EEO Complaint**

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4 Plaintiff Gerard Ng is employed as a city carrier for the United States Post
5 Office. Compl; dkt. 1, ¶ 5.1. Ng is an Asian American citizen of Filipino descent. *Id.*
6 ¶ 4.1. On May 28, 2008, Ng filled out an “Information for Pre-Complaint
7 Counseling” form, after having requested an appointment with a dispute resolution
8 specialist on May 20, 2009. Cohen Decl., dkt. 11, Ex. B (“Pre-Complaint Form”). The
9 Dispute Resolution Specialist’s Inquiry Report lists an initial interview taking place on
10 June 10, 2008, and a mediation occurring on June 11, 2008. Sebree Decl., dkt. 15,
11 Ex. 1 (“DRS Inquiry Report”).
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13 On August 5, 2008, Ng filed an “EEO Complaint of Discrimination in the
14 Postal Service.” Cohen Decl, Ex. C (the “EEO Complaint”). Ng’s EEO Complaint
15 alleged that discriminatory acts took place on May 10, May 13, and June 2, 2008. *Id.*,
16 Ex. C at 1. Ng alleged that on May 10, 2008, his supervisor Fred Tapuro questioned
17 him about his lunch time at a public restaurant, embarrassing and humiliating him, and
18 telling him that he was the cause of the post office losing money. *Id.*, Ex. C at 2. Ng
19 alleged that on May 13, 2008, he approached Tapuro to discuss the May 10, 2008
20 incident, but that an argument erupted and Tapuro ordered him to leave the workroom
21 floor. *Id.*, Ex. C at 2. Also in his EEO Complaint, Ng described a letter from Mary
22 Mitchell, Acting Manager of the station, in which she placed him on non-pay status
23 due to the May 10, 2008 incident. *Id.*, Ex. C at 2. Ng further alleged in the EEO
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1 Complaint that other employees have engaged in more serious incidents, but none
2 were placed on non-pay status, and that this showed “a disparity of treatment” against
3 him. *Id.*, Ex. C at 2. The EEO Complaint described two interviews with Acting
4 Station Manager Louise Stafford, the first of which took place in the presence of the
5 union shop steward, Brad Larsen. *Id.*, Ex. C at 2-3. After the first of these interviews,
6 on May 21, 2008, Stafford placed Ng on non-pay status until further notice. *Id.*, Ex. C
7 at 3. Ng alleged that the second interview, on May 23, 2008, was “simply a renewed
8 attack on [his] integrity and reputation.” *Id.*, Ex. C at 3. Ng again alleged “a total
9 disparity in treatment towards [him] because of [his] race and national origin.” *Id.*,
10 Ex. C at 3.
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13 In the EEO Complaint Ng asserted that “Mr. Tapuro, Ms. Stafford, Mr. Jeff
14 Maxfield, and Ms. Mary Mitchell all have a history of harassing and intimidating
15 Asians especially of Filipino descent,” that “[n]umerous grievances have been filed
16 against them,” and that “[t]his is the second EEO complaint against Mr. Tapuro in a
17 span of 2 months this year alone.” *Id.*, Ex. C at 4. He further asserted that “[t]hese
18 individuals have brought upon me tremendous emotional distress” *Id.*, Ex. C at 4.
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21 **B. EEO Investigation and Agency Decision**

22 In a letter dated August 20, 2008, the EEO Office informed Ng and his
23 attorney, Curman Seabee, that the EEO Office had received his formal complaint and
24 had accepted it for investigation. Cohen Decl., Ex. D at 1. The letter limited the scope
25 of investigation to the issues listed:
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- 1 1. On May 13, 2008, Complainant was sent home after confronting
- 2 his supervisor about a May 10, 2008 incident;
- 3 2. On May 15, 2008, Complainant received a letter informing him that he
- 4 was placed in a non-pay status;
- 5 3. On May 21, 2008, Complainant was placed in a non-pay status; and
- 6 4. On June 2, 2008, Complainant was issued a Notice of Removal.

7 *Id.*, Ex. D at 1. The letter further advised that “[i]f you do not agree with the defined
8 accepted issue(s), you must provide a written response specifying the nature of your
9 disagreement within seven (7) calendar days of receipt of this letter.” *Id.*, Ex. D at 1.
10 There is no evidence in the record, nor any allegation, that Ng or his attorney filed any
11 written response to challenge the EEO Office’s definition of accepted issues.
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13 On November 25, 2008, a final agency decision was issued concluding that “the
14 evidence does not support a finding that the complainant was subjected to
15 discrimination as alleged.” *Id.*, Ex. E (“Final Agency Decision”) at 12.
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17 **C. Present Action**

18 On February 13, 2009, Ng filed his civil complaint. As in his EEO Complaint,
19 Ng’s civil complaint outlines the May 10, 2008 incident and the subsequent
20 employment actions taken against him between May 13 and June 2, 2008. Compl.
21 ¶¶ 5.2-5.8. Ng’s civil complaint alleges under Title VII that John Potter, the
22 Postmaster General, discriminated against Ng “on the basis of his race and national
23 origin in the terms and conditions of his employment and created an unlawful hostile
24 work environment.” *Id.* ¶ 6.2. The parties agree that Ng’s civil complaint alleges two
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claims of discrimination under Title VII: one for disparate treatment and one for hostile work environment.

II. Discussion

A. Standard of Review

Defendant Potter moves to dismiss Plaintiff Ng's Title VII hostile work environment claim for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).¹ The plaintiff bears the burden of establishing subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). When considering a challenge to the factual existence of subject matter jurisdiction, a court is not restricted to the pleadings, but may review any evidence necessary to ensure that jurisdiction is proper. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). Although a court may look outside the pleadings, this does not convert the motion into one for summary judgment. *Id.*²

B. Exhaustion of Administrative Remedies Standard

Defendant Potter moves to dismiss Plaintiff Ng's Title VII hostile work environment claim based on Ng's failure to exhaust his administrative remedies with respect to that claim. Substantial compliance with the exhaustion requirement is a jurisdictional prerequisite under Title VII. *Leong v. Potter*, 347 F.3d 1117, 1122 (9th

¹ Potter is not moving to dismiss Ng's Title VII disparate treatment claim.

² Plaintiff Ng mistakenly set forth the summary judgment standard as the standard of review. *See* Pl.'s Resp. at 3-4.

1 Cir. 2003). The jurisdictional scope of the court action depends upon the scope of the
2 EEOC charge, the actual investigation, and what could reasonably have been expected
3 to grow out of the investigation. *Id.*; *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091,
4 1099 (9th Cir. 2002). Because typical complaints are filled out by non-attorneys,
5 courts construe the EEOC charge with “utmost liberality,” and it is sufficient that the
6 EEOC is apprised of the alleged discriminatory parties and the alleged discriminatory
7 acts. *Leong*, 347 F.3d at 1122; *see also Sosa v. Hiraoka*, 920 F.2d 1451, 1458 (9th
8 Cir. 1990). Allegations of discrimination not included in the administrative charge
9 must be like, or reasonably related to, those made in the civil complaint for the court to
10 consider them. *Maui Police Dept.*, 276 F.3d at 1100. Additionally, a court considers
11 whether a separate EEOC complaint and investigation would be redundant. *Id.* at
12 1102. The exhaustion requirement allows the EEOC to serve its investigative and
13 conciliatory role, puts parties on notice of the claim, and narrows the issues for prompt
14 adjudication. *Id.* at 1099.

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18 Absent a charge of agency negligence in recording a claim, a court examines
19 only the EEOC complaint and the related investigation to determine exhaustion. *Maui*
20 *Police Dept.*, 276 F.3d at 1100. “The crucial element of a charge of discrimination is
21 the factual statement contained therein.” *Id.* (quoting *Sanchez v. Standard Brands,*
22 *Inc.*, 431 F.2d 455, 462 (5th Cir. 1970)).
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1 **C. Hostile Work Environment Standard**

2 To establish a hostile work environment claim premised on race or national
3 origin under Title VII, a plaintiff must prove: (1) that he was subjected to verbal or
4 physical conduct of a racial nature, (2) that the conduct was unwelcome, and (3) that
5 the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's
6 employment and create an abusive work environment. *See Vasquez v. County of Los*
7 *Angeles*, 349 F.3d 634, 642 (9th Cir. 2003). The Court considers the totality of
8 circumstances, including the frequency and severity of the conduct, whether the
9 conduct is physically threatening or humiliating or is a mere offensive utterance, and
10 whether it unreasonably interferes with an employee's work performance. *Id.* The
11 working environment must be both subjectively and objectively perceived as abusive.
12 *Id.* Further, "[h]ostile environment claims are different in kind from discrete acts.
13 Their very nature involves repeated conduct." *Nat'l R.R. Passenger Corp. v. Morgan*,
14 536 U.S. 101, 115 (2002). For a hostile work environment claim, "the unlawful
15 employment practice cannot be said to occur on any particular day. It occurs over a
16 series of days or perhaps years, and in direct contrast to discrete acts, a single act of
17 harassment may not be actionable on its own." *Id.*

18 **D. Analysis of Ng's Exhaustion of Remedies**

19 **1. Ng's EEO Complaint Alleges Discrete Acts of Discrimination**

20 Ng filed an EEO Complaint alleging a number of discrete acts of alleged
21 discrimination. Those discrete acts cannot support a hostile work environment claim.
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1 *See Mathirampuzha v. Potter*, 548 F.3d 70 (2d Cir. 2008).³ In *Mathirampuzha*, the
2 plaintiff filed an EEO Complaint regarding one alleged act, but in his civil complaint
3 filed in district court he also alleged he was subjected to a hostile work environment.
4 *Id.* at 73. There was no reference to repeated conduct in the EEO Complaint, nor to
5 the cumulative effect of individual acts. *Id.* at 77. Instead, there was a single act of
6 physical and verbal abuse alleged, which was not reasonably related to a hostile work
7 environment claim. *Id.* Thus, the plaintiff had not complied with the exhaustion
8 requirement regarding his hostile work environment claim. *Id.* Although Ng relies
9 heavily on *Mathirampuzha*, the case actually supports the dismissal of his claim. Like
10 the plaintiff in *Mathirampuzha*, Ng raised only discrete acts of discrimination in his
11 EEO Complaint, and he did not assert that he had been subjected to verbal or physical
12 conduct of a racial nature that was sufficiently pervasive to alter the conditions of his
13 employment or create an abusive work environment. First, Ng alleged no physical
14 conduct. Second, the verbal conduct alleged between Ng and his managers was not of
15 a racial nature. Just as in *Mathirampuzha*, Ng made no reference to repeated conduct
16 or to the cumulative effect of individual acts in his EEO Complaint.
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22 ³ Both Potter and Ng rely on this Second Circuit case to support their arguments
23 because the facts are somewhat analogous. The Second Circuit's Title VII
24 jurisprudence is similar to that of the Ninth Circuit in that it emphasizes the substance
25 and not the label of the charge, construes the charge liberally, and allows the
26 exhaustion requirement to cover not only what was investigated, but what could
reasonably be expected to arise from the investigation. *See Deravin v. Kerik*, 335 F.3d
195, 200-01 (2d Cir. 2003).

1 Ng relies on *Sosa v. Hiraoka*, 920 F.2d 1451 (9th Cir. 1990), to support his
2 contention that the discrete acts alleged in his EEO Complaint, coupled with his
3 requested resolution to “stop the practice of discrimination and harassment towards
4 Asians, especially Filipinos,” found in the DRS Inquiry Report, sufficiently notified
5 the agency of a hostile work environment. *See* Sebree Decl., Ex. 1 (the DRS Inquiry
6 Report). In *Sosa*, the plaintiff alleged that the defendants had “*engaged in a pattern*
7 *and practice of retaliating against me*” in his administrative charge. 920 F.2d at 1457
8 (emphasis in original). Additionally, *Sosa* alleged that the defendants “had subjected
9 me [Sosa] to intimidation, harassment, and disparate treatment *with respect to terms*
10 *and conditions of employment.*” *Id.* (emphasis added).⁴ In contrast, Ng has never
11 alleged that the conditions of his employment were altered as a result of any
12 harassment. While Ng’s EEO Complaint specifically alleged that his managers “all
13 have a history of harassing and intimidating Asians especially of Filipino descent,” he
14 did not tie this sweeping allegation to any conduct directed toward himself. *See* Cohen
15 Decl., Ex. C (the EEO Complaint) at 4.
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22 ⁴ It is worth noting that Professor Sosa, in his civil complaint, listed facts
23 supporting his continuing violation theory that occurred from 1979 to 1988, and five of
24 the discrete acts alleged were his repeated denial of a promotion to Department Chair,
25 against the recommendations of his colleagues. *Sosa*, 920 F.2d at 1453-54. Here, Ng
26 alleged only discrete acts occurring between May 10 and June 2, 2008, and there are
no more facts alleged in his civil complaint than in his EEO Complaint to support a
hostile work environment claim.

1 **2. EEO's Investigation Was Limited to Disparate Treatment**

2 Ng argues that the investigation of his disparate treatment claim should have led
3 to an investigation of a hostile work environment claim. Ng and his attorney,
4 however, failed to object to the EEO's definition of accepted issues for the
5 investigation, which was limited to disparate treatment. Moreover, there is no
6 evidence that Ng or his attorney sought to amend the EEO Complaint to include
7 allegations that would have led to an investigation of a hostile work environment
8 claim. While a disparate treatment theory is obvious in Ng's EEO Complaint, the
9 same cannot be said about a theory of a hostile working environment.
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11 Ng further argues that an examination of Ng's managers' motive in treating him
12 disparately would have revealed a hostile work environment. In *E.E.O.C. v. Farmer*
13 *Brothers Company*, the plaintiff had alleged a discriminatory scheme on the part of
14 Farmer Brothers, whereby the president, in order to permanently reduce the percentage
15 of women in production jobs, laid off a number of both women and men, waited until
16 their nine-month recall rights had expired, and then filled the vacancies with only men.
17 31 F.3d 891, 894 (9th Cir. 1994). The defendants in *Farmer Brothers* argued that the
18 plaintiff had failed to include a discriminatory layoff claim in her administrative
19 charge and that such a claim was not like her allegations of discrimination in failing to
20 recall and rehire her. *Id.* at 899. The court found that the plaintiff had, in fact, alleged
21 a discriminatory layoff claim, but went on to hold that even if the plaintiff had not
22 alleged a discriminatory layoff claim, the layoff itself was an integral part of the
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1 defendants' discriminatory scheme. *Id.* The court reasoned that "in order to evaluate
2 (or even understand) [plaintiff's] theory of the case, it was *necessary* for the EEOC to
3 investigate the circumstances of [plaintiff's] layoff." *Id.* Unlike the plaintiff in
4 *Farmer Brothers*, Ng did not reveal his purposed hostile work environment theory of
5 the case by alleging a specific discriminatory scheme with a beginning, middle and
6 end. Ng's EEO Complaint alleged discrete instances of disparate discipline, and the
7 ensuing investigation was reasonably limited to those acts.
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10 **3. Ng's Hostile Work Environment Claim is Not Like or Reasonably**
11 **Related to His Disparate Treatment Claim**

12 "Incidents of discrimination not included in an EEOC charge may not be
13 considered by a federal court unless the new claims are 'like or reasonably related to
14 the allegations contained in the EEOC charge.'" *Green v. Los Angeles County*
15 *Superintendent of Sch.*, 883 F.2d 1472, 1475-76 (9th Cir. 1989) (quoting *Brown v.*
16 *Puget Sound Elec. Apprenticeship & Training Trust (Brown)*, 732 F.2d 726, 729 (9th
17 Cir. 1984)). The charge must at least describe the facts and legal theory with sufficient
18 clarity to notify the agency that employment discrimination is alleged, but it is the
19 substance, and not the label, of the charge that controls. *Ong v. Cleland*, 642 F.2d 316,
20 319 (9th Cir. 1981). A perfect fit between the administrative charge and judicial
21 complaint is not required, so long as the policies of promoting conciliation and
22 avoiding bypass of the administrative process have been served. *Id.*
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24 Ng relies on *Deravin v. Kerik*, 335 F.3d 195 (2d Cir. 2003), to support his
25 argument that his hostile work environment claim is like, and related to, his disparate
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1 treatment claim. In *Deravin*, the plaintiff had checked the box on his EEOC
2 Complaint marked “national origin,” but not the “race” box, as grounds for his claim.
3 335 F.3d at 200.⁵ Because the lines between discrimination on account of race and
4 national origin may overlap, or be “so thin as to be indiscernible,” the EEOC had
5 sufficient notice to look for potential race discrimination. *Id.* at 202-03. Moreover,
6 because it is the substance of the charge, and not its label, which controls the analysis,
7 it was sufficient that facts were alleged to support the plaintiff’s claim of race
8 discrimination. *Id.* at 202. Here, however, the lines between disparate treatment and
9 hostile work environment are not so thin as to be indiscernible. Ng’s two Title VII
10 claims are different legal theories of discrimination that require different factual
11 allegations for support. And, while Ng argues that he continually alleged that his
12 managers “all have a history of harassing and intimidating Asians especially of
13 Filipino descent” in his administrative complaint forms, there was no accompanying
14 substance to this allegation sufficient to notify the agency of a hostile work
15 environment claim.⁶

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19 If the judicial complaint presents a new theory of liability requiring a different
20 factual basis, neither of which is present in the administrative charge, the new theory is
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22 ⁵ The plaintiff also alleged that it was the negligence of the EEOC counselor
23 who helped him fill out this form that led to the mistake. *Id.*

24 ⁶ Ng argues that there was no box to check for hostile work environment on the
25 EEO Complaint form. The boxes listed are the protected classes that create the basis
26 of the discrimination, not the legal theories of discrimination. That there was no box to
check for “hostile work environment” did not relieve Ng of his obligation to allege
facts that would support a hostile work environment claim.

1 not like or reasonably related to the previous charge because the agency could not have
2 had adequate notice of it. *See Leong*, 347 F.3d at 1122 . In *Leong v. Potter*, the
3 plaintiff submitted an affidavit to the EEOC alleging discrimination against him based
4 on his “race, color, religion, sex, national origin, and/or age,” but he did not mention
5 any disability. 347 F.3d at 1121. The plaintiff’s judicial complaint alleging disability
6 discrimination was properly dismissed as not like or reasonably related to his
7 administrative claims since the agency did not have notice of this new theory of
8 liability. *Id.* Similarly, in *Brown*, intentional discrimination was not like or
9 reasonably related to a disparate impact charge filed a year prior to the intentional
10 discrimination charge. 732 F.2d at 729; *see also Diefenderfer v. Peters*, 2009 WL
11 1884419, slip. op. at 3 (W.D.Wash. June 29, 2009) (retaliatory constructive discharge
12 claim presented different theory of liability not like or reasonably related to EEO
13 charge). Likewise, Ng alleged discrete instances of disparate treatment in his EEO
14 Complaint, but neither the factual underpinnings nor the theory of a hostile work
15 environment claim were alleged.

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19 Where the claims are not so closely related that agency action would be
20 redundant, the EEO Office must be given opportunity to consider the claim before a
21 federal suit is brought. *Stache v. International Union of Bricklayers*, 852 F.2d 1231,
22 1234 (9th Cir. 1988). Here, the EEO Office was investigating whether similarly
23 situated employees had received lesser discipline for committing acts similar to Ng’s
24 conduct, and whether Ng’s more severe discipline was based on his race or national
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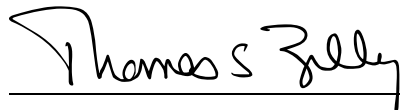
1 origin. This is a different analysis than whether Ng had been subjected to unwelcome
2 verbal or physical conduct directed at him because of his race or national origin that
3 was sufficiently severe or pervasive as to alter the conditions of his employment or to
4 create an abusive working environment. Ng's hostile work environment claim is not
5 like or reasonably related to the disparate treatment claims included in his EEO
6 Complaint.
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8 **III. Conclusion**

9 The Court GRANTS Defendant's Motion to Dismiss Plaintiff's Hostile Work
10 Environment Claim, dkt. 10, for failure to exhaust administrative remedies.
11 Accordingly, Plaintiff's hostile work environment claim is DISMISSED without
12 prejudice.
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14 IT IS SO ORDERED.

15 DATED this 12th day of November, 2009.

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19 Thomas S. Zilly
20 United States District Judge
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